

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

APR 17 2008

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LUIS GUTIERREZ-HERNANDEZ,

Defendant - Appellant.

No. 06-30173

D.C. No. CR-05-00176-WFN

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of Washington  
William Fremming Nielsen, District Judge, Presiding

Submitted April 15, 2008 \*  
Seattle, Washington

Before: ALARCÓN, RYMER, and BERZON, Circuit Judges.

Luis Gutierrez-Hernandez appeals the sentence imposed following his guilty plea to violating 8 U.S.C. § 1326. We granted Gutierrez-Hernandez's petition for rehearing and then deferred submission pending the court's en banc decision in

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*United States v. Gonzalez*, 506 F.3d 940 (9th Cir. 2007).<sup>1</sup> In light of *Gonzales*, we vacate Guterrez-Hernandez’s sentence and remand for resentencing.

*Gonzales* held that “a totally suspended sentence for a qualifying misdemeanor, regardless of its length, cannot be *counted* as a prior sentence.” 506 F.3d at 944-45 (emphasis in original). The district court held otherwise, understandably relying on the law of the circuit at the time. As the sentences on Guterrez-Hernandez’s two misdemeanor convictions were entirely suspended, he is entitled to be resentenced without those convictions being counted.

Guterrez-Hernandez argues that the district court erred in increasing his statutory maximum sentence under 8 U.S.C. § 1326(b)(2); that the court could not constitutionally find that he was removed “subsequent to” a prior conviction because this is a “fact” about his prior conviction; and that *Almendarez-Torres* is no longer good law. These arguments are foreclosed. *See United States v. Castillo-Rivera*, 244 F.3d 1020, 1025 (9th Cir. 2001) (rejecting claim that “subsequent to” finding is beyond the scope of the prior conviction exception); *United States v. Weiland*, 420 F.3d 1062, 1079-80 n.16 (9th Cir. 2005) (holding that we remain bound to follow *Almendarez-Torres* unless it is explicitly overruled by the United States Supreme Court).

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<sup>1</sup> The memorandum filed on November 15, 2006, is withdrawn.

Finally, Guiterrez-Hernandez's supplemental brief suggests that his sentence was improperly enhanced in light of this court's supervening decision in *United States v. Figueroa-Ocampo*, 494 F.3d 1211, 1216 (9th Cir. 2007). However, we leave this issue to the district court on remand.

SENTENCE VACATED and REMANDED.